

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
TANNER RETAIL SERVICES, LLC)	PERMIT NO. DL50-22558
d/b/a TANNER'S SOUTHSIDE GROCERY)	
1218 S. MICHIGAN ST.)	
PLYMOUTH, INDIANA 46563)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Tanner Retail Services, LLC, d/b/a Tanner's Southside Grocery, 1218 South Michigan Street, Plymouth, Indiana 46563 ("Applicant") is the applicant for a Type 115 Alcohol and Tobacco Commission ("ATC" or "Commission") permit, permit number DL50-22558. On or about May 17, 2006, Applicant filed its application, which was assigned to the Marshall County Local Alcoholic Beverage Board ("Local Board") for hearing. The Local Board heard the application request on September 5, 2006, and voted 4-0 to deny the application. The Commission adopted the recommendation of the Local Board on September 19, 2006.

The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge U-Jung Choe ("Hearing Judge"). The matter was set for hearing on January 10, 2007, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Applicant was represented by Jeffrey L. McKean, McKean Law Firm, P.C. There were no remonstrators of record before the Hearing Judge in this matter. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing, the evidence submitted to the Commission during the appeal hearing, and the contents of the entire ATC file, now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its

consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant:
1. Dan Tanner, owner;
 2. Andrea Gantz; and
 3. Maureen Holston, employee of the store.
- B. The following exhibits were introduced before the Local Board in favor of the Applicant:
1. Petitions with 185 signatures in support of Applicant.
- C. The following individuals testified before the Local Board against the Applicant:
1. Mark Fishburn;
 2. Barbara Hoedema, a resident of Plymouth;
 3. Amy Gerard, a resident and a business owner of Plymouth;
 4. Rebecca Rettig, a resident of Plymouth;
 5. Michael Bardwell, a resident of Plymouth;
 6. Larry Hoedema, a resident of Plymouth;
 7. Dara Hulse, a resident of Plymouth;
 8. Beth Kollars, a business owner of Plymouth; and
 9. Chris Davidson, a business owner of Plymouth.
- D. The following exhibits were introduced before the Local Board against the Applicant:
1. Petitions with 108 signatures opposing the issuance of permit to the Applicant.

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified at the ATC Hearing in favor of the Applicant:
1. Jeanne Tanner, owner.
- B. The following exhibits were introduced and admitted in support of the Applicant:
1. Exhibit 1 – Ida Chapman, *A Gallon When You Need It, Dan Tanner Hopes South Side Enjoys His New Grocery*, South Bend Tribune, November 18, 2005, at E;
 2. Exhibits 2A to 2I - Photographs of outside of Tanner's Grocery and signage;
 3. Exhibits 3A and 3B - Photographs of parking at Kain's Party Pack;
 4. Exhibits 4A to 4M - Photographs of inside of Tanner's Grocery and products sold;
 5. Exhibit 5 - Customer petitions with 185 signatures offered at Local Board hearing;

6. Exhibit 6 - Customer petitions with 118 signatures offered at ATC hearing;
 7. Exhibit 7 - Summary of customer petitions;
 8. Exhibit 8 - Letter of support dated 1/9/2007 from Ted Brown, a resident of Plymouth;
 9. Exhibit 9 - Letter of support dated 1/9/2007 from Brad King, a resident of Plymouth;
 10. Exhibit 10 - ATC records showing other dealer permits in Plymouth, <http://www.in.gov/apps/atc/permit> (accessed 1/7/2007);
 11. Exhibit 11 - Map showing location of dealer permits in Plymouth, <http://maps.yahoo.com/flash> (accessed 1/7/2007);
 12. Exhibits 12A to 12E - Photographs of neighborhoods on south side of Plymouth;
 13. Exhibit 13 – *Population Growth of Counties* (census data for Marshall County), <http://www.epodunk.com/top10/countyPop> (accessed 1/7/2007);
 14. Exhibit 14 - ATC records showing the quota for grocery store permits in Plymouth;
 15. Exhibit 15 - Statutory citations concerning permit restrictions on proximity to schools; and
 16. Exhibits 16A and 16B - Photographs showing proximity of permit to school.
- C. Remonstrators testifying against Applicant at ATC Hearing:
- None.
- D. The following exhibits were introduced and admitted to ATC in opposition to Applicant:
- None.

IV. FINDINGS OF FACT

1. Tanner Retail Services, LLC, d/b/a Tanner's Southside Grocery, 1218 South Michigan Street, Plymouth, Indiana 46563, permit number DL50-22558, is an applicant for a Type 115 ATC permit. (ATC file).
2. The Applicant operates a grocery store. (Local Board Hearing; ATC Hearing).
3. The ATC's quota for Type 115 grocery store permits in Plymouth is seven (7) and only one (1) has been issued. (ATC Hearing).
4. Six (6) grocery store permits are available to be issued in Plymouth. (ATC Hearing).
5. The Applicant is a fit and proper applicant, has maintained a reputation for

decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. (Local Board Hearing; ATC Hearing).

6. The Applicant is of good moral character and good repute in the community in which it does business and is qualified to hold the permit it seeks. (Local Board Hearing; ATC Hearing).

7. The population of Marshall County is growing. (ATC Hearing).

8. There has been significant residential growth and development on the south side of Plymouth where the Applicant's business is located. (Local Board Hearing; ATC Hearing).

9. Businesses in Plymouth that are competitors of Applicant possess alcoholic beverage permits. (Local Board Hearing; ATC Hearing).

10. The Applicant has applied for the Permit, in part, to compete with other outlets offering alcoholic beverages for sale in Plymouth. (ATC Hearing).

11. Applicant seeks to expand its business by offering a wider variety of products and services to meet its customers' needs. (Local Board Hearing; ATC Hearing).

12. Applicant seeks to provide convenience to its customers. (Local Board Hearing; ATC Hearing).

13. The Applicant's business is located more than 200 feet from a church or school. (Local Board Hearing; ATC Hearing).

14. Applicant's business property is zoned for commercial use. (ATC Hearing).

15. Applicant's business property has sufficient parking, which exceeds requirements outlined by local ordinance. (Local Board Hearing; ATC Hearing).

16. There are no other dealer alcoholic beverage permits serving the south end of Plymouth in the immediate vicinity of Applicant's business. The closest dealer permit is located

approximately .8 miles away. (ATC Hearing).

17. The Applicant has indicated that it will provide appropriate security policies and procedures if the permit is granted. (*Id.*).

18. Remonstrators submitted a petition at the Local Board Hearing containing the signatures of 108 people in opposition to the application. (Local Board Hearing).

19. Applicant submitted petitions signed by 303 customers who frequent the business of the Applicant stating that an alcoholic beverage permit was needed and desired at the proposed permit location. (Local Board Hearing; ATC Hearing).

20. Of the customers signing the petitions that Applicant submitted at the ATC Hearing, 69% lived within one (1) mile of Applicant's store and 82% lived within three (3) miles. (ATC Hearing).

21. The weight of the evidence, which includes petitions submitted by the Applicant, letters in support of the Applicant, and the availability of Type 115 permits in Marshall County, indicates that there is a need and desire in the Marshall community for the Applicant to obtain the permit. (Local Board Hearing; ATC Hearing).

22. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which the Applicant's business is located. (Local Board Hearing; ATC Hearing).

23. The Local Board voted 4-0 to deny the Permit. (ATC File; Local Board Hearing).

24. Three of the Local Board members stated that their decisions were based, at least in part, on information and contacts received outside the context of the Local Board hearing. (Local Board Hearing).

25. One of the Local Board members stated that she was voting against the

application because she did not want to see beer and wine in convenience stores and she did not want gas stations requesting permits. That same Local Board member stated, “I know there is nothing wrong with this [application] legally,” but she still voted against it. (*Id.*).

26. Any finding of fact may be considered a conclusion of law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Indiana Code § 7.1-1-2-2 and § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon this proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission’s rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. Applicant is a fit and proper applicant and is well qualified to hold an alcoholic beverage permit under Indiana law. Ind. Code § 7.1-3-9-10; 905 IAC 1-27-1.

8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).

9. The proposed permit location is more than 200 feet from a church or school. Ind. Code § 7.1-3-21-10; Ind. Code § 7.1-3-21-11.

10. The proposed permit location is not in a residential district. Ind. Code § 7.1-3-19-13; 905 IAC 1-18-1.

11. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

12. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

13. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

14. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

15. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

16. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

17. Where an Applicant shows that competing stores located in the community are selling alcohol, such evidence constitutes a desire to purchase the product. *Id.*

18. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on in the premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19.

19. The Commission may issue a beer and wine permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19.

20. The Applicant is a "grocery store" under Indiana law and is therefore qualified to hold a Type 115 grocery permit. Ind. Code § 7.1-3-5-2.

21. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

22. To deny the application to Applicant while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

23. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued. (Local Board Hearing).

24. The Local Board's recommendation is erroneous if there is a lack of substantial evidence which supports it. Ind. Code § 7.1-3-19-11.

25. The Commission may decline to follow the recommendation of the local board where the recommendation is not based on substantial evidence. *Id.*

26. Applicant has submitted substantial evidence that it is qualified to hold a Type 115 grocery beer and wine permit. (Local Board Hearing; ATC Hearing).

27. The Commission may reverse the Local Board's action in denying the application of a permit if it finds that the Local Board's decision was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

28. The Local Board's decision in denying the issuance of permit to the Applicant was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Id.*

29. Any conclusion of law may be considered a finding of fact if the context so warrants.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the finding of the Marshall County Local Board to recommend denial of the permit application of the Applicant in this matter was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant, Tanner Retail Services, LLC, d/b/a Tanner's Southside Grocery, 1218 S. Michigan St., Plymouth, Indiana 46563, permit

number DL50-22558, is approved, the recommendation of the Local Board in this matter is reversed, and the permit applied for herein is GRANTED.

Date: February 15, 2007

U-Jung Choe, Hearing Judge